filing of truly cost-based, deaveraged ULL rates, or by the LPSC's reopening of its costing docket.

III. BELLSOUTH STILL CANNOT SATISFY THE COMPETITIVE CHECKLIST

In addition to BellSouth's failure to meet the pricing requirements incorporated into the competitive checklist, BellSouth also fails to meet several other key checklist requirements. As e.spire discusses below, BellSouth's provisioning and implementation problems continue and are neither cured nor isolated. e.spire continues its efforts to work cooperatively with BellSouth to resolve implementation issues. As a result, BellSouth's performance has improved in some respects. Because e.spire, by necessity must develop a long-term working relationship with BellSouth, e.spire has to date exercised restraint in its filing of complaints at the FCC and State commissions – despite the pervasive and persistent nature of numerous operational issues. With each Section 271 filing, however, it becomes incumbent upon e.spire to report to the FCC in detail the operational issues that face CLECs such as e.spire in the marketplace.

Thus, e.spire submits that BellSouth remains unable to provide coordinated loop cutovers, number portability or collocation in compliance with the Act. BellSouth's refusal to pay reciprocal compensation for traffic terminated on e.spire's network represents another checklist failure. BellSouth also has failed to address fully deficiencies recognized by the Commission in its OSS. Moreover, BellSouth's interim performance measurements do not provide sufficient information from which compliance with the Act can be determined and, due to their interim nature, there is no guaranty that they will not disappear or be diluted further upon grant of interLATA authority.[38]

A. BellSouth Has Not Resolved the Significant Process Issues Relating to Unbundled Loops that e.spire Raised in its Unbundled Loop Complaint

Given that e.spire is purchasing unbundled loops from BellSouth in New Orleans, the best evidence of compliance with the fourth and eleventh checklist items is BellSouth's actual performance in provisioning ULLs and coordinated cutovers for e.spire in New Orleans. The Commission already has determined that BellSouth must demonstrate that it offers access to unbundled loops in a manner sufficient to allow an efficient competitor a meaningful opportunity to compete.[39] e.spire submits that this standard requires coordinated cutovers of ULLs and number portabilty in five minutes or less. This is the standard incorporated in the e.spire/BellSouth interconnection agreement. It also has been adopted by the Georgia PSC.[40] Moreover, BellSouth also claims that it is capable of meeting this standard, although its performance to date for e.spire would suggest otherwise.[41] Indeed, e.spire is disappointed to

38 e.spire also submits that BellSouth's refusals to provide e.spire with extended loops and transport and multiplexing in combination with loops represent additional checklist deficiencies. Moreover, because competitors have not yet had the opportunity to test BellSouth's new policy on the resale of CSAs, it cannot be determined whether BellSouth has resolved the checklist deficiency cited by the Commission on that front.

39 *In re Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services In South Carolina,* 13 FCC Rcd 539 (1997), ¶ 98 [hereinafter *"BellSouth South Carolina Order"*].

40 *In re Performance Measurements for Telecommunications Interconnection, Unbundling and Resale,* Georgia PSC Docket No. 7892-U (Order signed May 6, 1998), at 25-26.

41 BellSouth Brief at 57 ("In a recently completed study, BellSouth determined that the average cutover time per loop was approximately four minutes, and the average time to port the number was 39 seconds.").

inform the Commission that the manner in which BellSouth has provided ULLs and coordinated cutovers to e.spire in New Orleans does not meet this standard at this time.

As a threshold matter, it is important to note that BellSouth only claims to have "promised" 107 loops to competitors in Louisiana. Therefore, it is clear that, as of the date of its filing, BellSouth had actually provisioned *fewer than* that number of loops in Louisiana. By contrast, Ameritech had provisioned approximately 16,000 ULLs in Michigan when it filed its Section 271 application.[42] As is the case with collocations, BellSouth has yet to prove consistent performance in provisioning a significant volume of ULLs in Louisiana.[43]

More critically, BellSouth's efforts to provision unbundled loops for e.spire in New Orleans have been plagued by serious operational flaws, resulting in repeated unexpected disconnects, cutovers taking place several hours after the scheduled cutover time, and significant number portability failures. Many of the problems experienced by e.spire are precisely the same problems that e.spire complained of in its complaint to the FCC filed on January 6, 1997 and still pending at the Commission. One e.spire provisioner estimated that 95 percent of e.spire's unbundled loop cutovers in Louisiana have experienced serious operational failings caused by BellSouth. The most prevalent issues include: (1) disconnection of customers prematurely; (2) failure to provide advance notice of facilities unavailability; (3) failure to have BellSouth technicians available to perform cutovers; (4) failure to provision the unbundled loops such that the customer receives the service – including long distance, vertical features, number portability – as ordered; and (5) failure to rectify e.spire customer problems promptly and accurately.

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42 Ameritech Brief, CC Docket No. 97-137 (Ameritech Michigan), at 31.

43 Of the two physical collocations completed in the state, only **[confidential information: REDACTED]** is with an unaffiliated competitor. BellSouth Brief at 36.

The following recent examples illustrate some of the problems e.spire and its customers have experienced:

- One e.spire customer was cutover but did not have any long distance service, despite e.spire's proper request for a long distance provider. e.spire requested that the customer be cut-back to BellSouth service to provide an immediate solution to the problem. BellSouth refused to cut the customer back. Although e.spire is not required in the agreed upon process to contact the long distance provider, in this instance, e.spire had to do so in order to obtain long distance service for its customer.

- On another cutover, BellSouth was not ready to cut the customer over on the firm order confirmation ("FOC") date. Accordingly, the parties agreed that the cutover would take place on another day. Due to systems problems of BellSouth, a problem that was often witnessed in Columbus, Georgia in late 1996 and in early 1997, the disconnect order remained in BellSouth's system and the customer was disconnected (but not cutover to e.spire) on the date initially scheduled for the cutover. Moreover, this disconnect took place in the middle of the day, despite the fact that the cutover had been scheduled for later in the day.

- e.spire has experienced number portability problems in Louisiana that appear to be similar to the issues that e.spire experienced in Columbus, Georgia in April and May 1997. Although the technical issues were addressed by BellSouth at that time in Columbus, they appear to be new issues for BellSouth personnel in New Orleans. Specifically, BellSouth has botched cutovers for at least two e.spire customers in New Orleans who had lead numbers, with hunt groups established such that when two or more calls are received at the same time, the surplus calls would hunt to additional extensions, permitting the customer to take multiple calls at the same time. This is fairly standard requirement of businesses that receive calls at a main number. When the e.spire customers were cut over, only the lead line could accept incoming calls. The company, a shipping company, was unable to receive the vast majority of its long distance calls as a result of this problem. According to BellSouth technicians in New Orleans, BellSouth was required to build a "simulated facilities group" ("SFG") to accommodate the transmission of multiple paths to the customers. The BellSouth New Orleans technicians suggested that this was the first time such an SFG had been built, so it was a complicated process.[44]

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44 Unfortunately, this was not the first time e.spire experienced this number portability problem with BellSouth. e.spire had precisely the same problem – inability to direct multiple calls to a single customer – in Columbus, Georgia in April and May 1997. The BellSouth solution at that time was to build a simulated facilities group – the same solution proposed here. It is clear that BellSouth is not addressing issues such as this proactively, and possibly not even sharing unbundled loop and number portability information across the region.

This same customer also is experiencing low volume on its lines. BellSouth has stated that it could not prevent the 6 decibels of loss experienced by this customer.[45]

- Problems also have resulted from the manner in which e.spire must "accept" unbundled loops. Given the regularity of problems with unbundled loops purchased in New Orleans, e.spire often is not prepared to accept a loop as completed for 24 to 48 hours from the date of cutover. BellSouth routinely ignores e.spire's request to delay acceptance. In fact, BellSouth has informed e.spire that unbundled loops will be automatically accepted at 9:00 p.m. on the date of cutover, regardless of feedback from e.spire personnel responsible for the cutover. In addition, until an order is accepted, e.spire cannot generate a trouble ticket in order to request repairs. (Prior to acceptance, it is considered an active install, and not subject to repair.) As a result, such repairs typically do not take place within 24 hours.

- On another cutover (8 loops), BellSouth disconnected the customer early again. The e.spire customer became irate, and e.spire was forced to extend the cutover to another day.

- When cutover problems occur after 6:00 p.m., BellSouth's technicians and UNE provisioning center are not available to address e.spire customer problems and issues. In such instances, the cutover problems are not addressed until the next day. This is yet another BellSouth practice that puts e.spire at a competitive disadvantage.

- It is not unusual for BellSouth's technicians to simply not show up on the day of an unbundled loop cutover. If facilities are not available, e.spire typically finds out, not in advance, but on the day of a cutover. This gives e.spire no time to inform its customer of the jeopardy, and to make alternative arrangements.

BellSouth's performance on its initial Louisiana cutovers raises two additional concerns. First, unexpected disconnections and number portability issues, for example, were precisely the types of problems that plagued e.spire customers in Columbus, Georgia in late 1996 and early 1997. BellSouth clearly has failed to create processes and systems in the interceding year and a half to ensure that these problems do not continue to recur. This suggests an uncoordinated, parochial approach whereby each new city implements unbundled loop processes for the first time.

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45 This problem also was encountered by e.spire with BellSouth's provisioning in

(continued...)

Second, the level of problems associated with e.spire's unbundled loops may not be fully reflected in BellSouth's performance measures. For example, it is unclear whether the disconnects that take place when the customer is still a BellSouth customer are considered problems associated with an unbundled loop cutover or whether they are treated as problems with BellSouth service that are not captured in BellSouth's statistics. Given the percentage of premature disconnects e.spire has experienced, BellSouth should be required to report the number of loops that experience such premature problems. BellSouth should also be required to report how many loops experience service issues within the first five days after cutover, to ensure that repair and maintenance issues are captured. Furthermore, to the extent that e.spire service issues are not captured in BellSouth performance measurements, the Commission should recommend biannual state reviews of performance measures to ensure that all carrier and customer issues are captured in these critical reports.

In sum, the provisioning problems experienced by e.spire in New Orleans are, in many instances, identical to those it experienced in Columbus, Georgia beginning a year and eight months ago. Their recurrence suggests that BellSouth's provisioning problems are not merely isolated start-up problems but, rather, are fundamental process problems that have never been successfully addressed. Thus, before checklist compliance can be determined, e.spire submits that BellSouth must establish that it has performed a substantial number of loop cutovers and that its average interval – not simply for a test group, but the entire group – is within the five minute interval expected by customers and essential to effective local competition. Moreover, BellSouth

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(...continued)
Columbus, Georgia in late 1996 and early 1997.

must establish consistent processes and procedures to alleviate its endemic problems in provisioning high quality unbundled loops, with number portability.

B. BellSouth Refuses to Pay Reciprocal Compensation

BellSouth's claim that it pays reciprocal compensation in accordance with the requirements of Section 252(d)(2) and, therefore, meets the thirteenth checklist item is both unfounded and astounding. To date, BellSouth has refused to pay *any* reciprocal compensation to e.spire. BellSouth's continuing refusal to pay e.spire reciprocal compensation also constitutes a violation of Section 251(b)(5).

Under the terms of the e.spire/BellSouth Interconnection Agreement, the parties agreed to utilize so-called "bill and keep" arrangements in lieu of cash reciprocal compensation arrangements until such time as the local traffic exchanged thereunder was out-of-balance by at least two million minutes per month in either direction. e.spire notified BellSouth during November 1997 that this threshold had been exceeded. Pursuant to the terms of its negotiated most favored nation clause, e.spire notified BellSouth of its election to replace the bill and keep system with the reciprocal compensation arrangements included in other approved BellSouth local interconnection agreements on a going-forward basis. Thereafter, e.spire measured the traffic involved and regularly rendered invoices to BellSouth for transporting and terminating its local traffic.

However, BellSouth has failed to make *any* payment of reciprocal compensation to e.spire. Contending that calls placed to Internet Service Providers ("ISPs") are not "local", and that such traffic may be intermixed with other local calls in e.spire's local traffic measurements, BellSouth has refused to pay *any* of the millions of dollars in reciprocal compensation billed by e.spire over the past year.[46] Notably, BellSouth has not paid reciprocal compensation even for local traffic that is not attributable to ISP calls. Importantly, BellSouth even has refused e.spire's repeated offer to accept payment subject to retroactive true-up if its position that ISP calls are not "local" ultimately is accepted by regulators.

As a consequence, e.spire has been forced to file collections actions against BellSouth across its region.[47] It is hard to fathom how BellSouth can contend that it satisfies the requirement to pay reciprocal compensation, when the only way to actually obtain payment is to sue for it.

In short, BellSouth's refusal to pay reciprocal compensation represents a deliberate and anticompetitive attempt to impose financial hardship on its competitors and to reserve the ISP submarket for itself. Providing yet another example of BellSouth's ability to unilaterally alter or flatly ignore the terms of its LPSC-approved interconnection agreement with e.spire, BellSouth also has refused to recognize e.spire's right to use the agreement's most favored nation clause to opt into reciprocal compensation rates established by BellSouth in its interconnection agreement with another CLEC. e.spire's attempts to resolve these issues with BellSouth have been rebuffed. Rather, e.spire has been forced to litigate the reciprocal compensation issue in seven BellSouth states.

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46 Relying on the Eighth Circuit ruling that ILECs cannot be forced to agree to include "pick and choose" provisions in local interconnection agreements, BellSouth also refuses to recognize the validity of e.spire's use of its most favored nation clause to establish reciprocal compensation arrangements. Remarkably, BellSouth ignores the fact that the most favored nation provision was accepted by BellSouth *voluntarily* during negotiations, and now seeks to unilaterally amend the agreement to strike the provision.

47 Formal complaints have been filed with PSCs in Georgia and Kentucky, while the matter has been submitted to commercial arbitration in Louisiana, Mississippi, Alabama and (continued...)

C. BellSouth Does Not Offer Nondiscriminatory Access to OSS

Nondiscriminatory access to OSS is critical to local competition. As the Commission has long recognized, if a competing provider is denied nondiscriminatory access to OSS, the competitor "'will be severely disadvantaged, if not precluded altogether, from competing' in the local exchange market."[48] In its (first) *BellSouth Louisiana Order*, the Commission concluded that BellSouth failed to offer nondiscriminatory access to OSS functions for the pre-ordering, ordering and provisioning of resale services. Although BellSouth has continued to improve its OSS, many of the shortcomings cited by the Commission – and other deficiencies – remain unaddressed. Additionally, the performance measurements offered by BellSouth fail in many key respects to provide the Commission with a basis for judging the reasonableness and nondiscriminatory nature of BellSouth's performance.

1. BellSouth Has Failed to Remedy Many OSS Deficiencies Including Several Cited by the Commission in its Rejection of BellSouth's First Louisiana Application

Although BellSouth has addressed some of the OSS deficiencies identified by the Commission in the *BellSouth Louisiana Order,* many remain uncorrected. In addition, OSS deficiencies left uncovered in the Commission's review of BellSouth's OSS for resale services remain unaddressed. Most significant among all of these problems is the fact that manual intervention continues to plague BellSouth's OSS. BellSouth's latest figures reveal that,

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(...continued)
South Carolina. e.spire is contesting BellSouth's position in generic proceedings on the topic of reciprocal compensation obligations in Florida.

48 *BellSouth Louisiana Order* ¶ 20 (quoting the Commission's *Local Competition Order* and citing its *BellSouth South Carolina Order*).

although the electronic flow-through rate has improved for competitors' orders, the rate remains significantly below BellSouth's performance for its own orders. In fact, BellSouth figures reveal that only 69 percent of all CLEC orders submitted electronically "flowed through" without manual intervention.[49] Although BellSouth claims that the "adjusted" flow-through rate is 82 percent, after accounting for "CLEC errors", it does not provide any basis for determining the source of these alleged "errors".[50] In fact, many CLEC errors actually are caused by BellSouth's inferior OSS interfaces. When compared to BellSouth's own flow-through of 96 percent for residential orders and 83 percent for business orders, it is quite plain that BellSouth still is not providing nondiscriminatory access to its OSS.[51]

BellSouth also has failed to correct the disparity experienced by competitors in obtaining due dates for orders. Although BellSouth claims that it provided FOCs within 24 hours 93 percent of the time for "accurate business resale orders submitted electronically" and 99 percent of the time for "accurate residential orders submitted electronically",[52] these percentages do not address the fact that the vast majority of orders – including almost all UNE orders – continue to be processed manually. As a result, CLECs continue to face substantial delays in obtaining due dates for most orders. For example, only 25 percent of UNE orders and only 33 percent of ULL orders received a FOC in less than 24 hours.[53]

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49 *See* Stacy Performance Aff., Exhibit WNS-3 at Report: Percent Flow Through Service Requests (Detail). Although BellSouth characterizes this number as "nearly three-quarters", the actual figure is only 69 percent. BellSouth Brief at 26.

50 *Cf. BellSouth Louisiana Order* ¶ 29 (concluding that the record did not support BellSouth's claim that the disparity is caused by CLEC errors).

51 *BellSouth Louisiana Order* ¶ 28.

52 BellSouth Brief at 28.

53 Stacy Performance Aff., Exhibit WNS-3 at Report: Firm Order Confirmation Timeliness.

Other shortcomings left unaddressed by BellSouth are its failure to provide due date jeopardy notices for BellSouth-caused delays and its failure to introduce an integrated OSS interface capable of replicating the combined pre-ordering and ordering functionality provided to BellSouth's own retail operations. The Georgia PSC has determined that Application Program Interface ("API"), an electronic interface under development by BellSouth, will permit eventual integration by CLECs and has ordered that it be developed, tested and made available to Georgia CLECs by the end of this year.[54] The LPSC has imposed no similar requirement on BellSouth. Thus, in the absence of a seamless interface that minimizes human intervention for pre-ordering and ordering functions, CLECs still are faced with expensive, time-consuming and error-plagued dual entry not faced by BellSouth's own retail operations.

Significantly, in mandating the implementation of the API interface, the Georgia Commission, based in part on the testimony of e.spire witness Dave White, rejected BellSouth's claims that CGI-LENS and EC-Lite can be used to integrate pre-ordering and ordering functionalities.[55] Rather, the Georgia Commission found that "these approaches suggested by BellSouth impose upon CLECs the burden of attempting to perform the integration of the pre-ordering systems (CGI-LENS or EC-Lite) with the ordering systems."[56] The Georgia Commission also found that the LENS-CGI specification: (1) "does not have all of the required information to enable a CLEC to perform the necessary development effort for integration, and BellSouth has not kept that specification current"; and (2) "requires the use of an underlying

54 *In re Investigation into Development of Electronic Interfaces for BellSouth's Operations Support Systems,* Georgia PSC Docket No. 8354-U (Order Adopting OSS Report signed June 3, 1998), at 10.

55 *Id.* at 8-9.

56 *Id.* at 9.

Hyper Text Markup Language ("HTML") presentation as part of the data delivery mechanism, and this forces CLECs into a slower, less efficient integration than is available to BellSouth for its comparable retail operations."[57] CGI also raises serious security and robustness concerns that render it unacceptable as a means of integration.

Another OSS deficiency yet to be corrected by BellSouth is its practice of stripping away the rates of services and equipment items displayed on customer service records ("CSRs") when providing the CSR through LENS. The Georgia PSC also has addressed this issue and has mandated that BellSouth immediately make this information available via fax and electronically through LENS. In reaching its conclusion, the Georgia PSC found that the rate information is not proprietary and noted that the FCC has recognized the significance of CSR information as part of the pre-ordering OSS function and has "stated that 'a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to a customer that wishes to subscribe to the competing carrier's service, may well, depending upon the circumstances, constitute an unreasonable practice in violation of section 201(b).'"[58]

Unfortunately, neither the LPSC nor any other state commission in BellSouth territory has followed suit. BellSouth will not make this pricing available unless ordered to do so. e.spire cannot even determine whether it is receiving the resale discount off of the price actually charged by BellSouth without this information. In order to obviate the necessity of e.spire filing eight

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57 *Id.*

58 *Id.* at 10 (quoting *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information: Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket Nos. 96-115 and 96-149, ¶¶ 84-85 (rel. Feb. 26, 1998).

complaints in eight BellSouth states, not to mention e.spire's eleven other facilities-based states, the Commission should make CSR pricing availability a precondition for Section 271 entry.

Finally, it is important to note that many aspects of BellSouth's OSS remain relatively untested. The vast majority of orders continue to be processed manually. BellSouth stated in the LPSC's performance measurement workshops on July 23 that only approximately 30,000 out of 130,000 monthly orders are processed electronically. Indeed, BellSouth has not demonstrated any capacity to provide electronic OSS for complex orders or UNEs.

2. BellSouth's *Interim* Performance Measurements Are Inadequate and Could Disappear Tomorrow

BellSouth's *interim* performance measurements or service quality measurements ("SQM") are inadequate for at least two overarching reasons. First, they lack a number of measures and fail to provide comparative data necessary for determining whether BellSouth is offering nondiscriminatory access to OSS. Second, they fail to protect against "backsliding" as they lack provisions for auditing and self-enforcement.[59]

Significantly, the measures proposed by BellSouth in Louisiana fall well short of those proposed by the Commission in its recent performance measurements and reporting requirements rulemaking and lack the crucial five minute standard cutover interval included in the Georgia measurements which served as the basis for the LPSC's interim measures. Among the measures endorsed by the FCC and not included in BellSouth's SQM are:

1. average customer conversion interval;
2. average jeopardy interval;

[59] Critically, BellSouth's initial reports have never been audited by CLECs. It would be interesting to audit the extent to which BellSouth's reports registered the litany of unbundled loop incidents recited above.

3. percentage of orders given jeopardy notices;
4. percentage of troubles within X days for new orders;
5. average time to provide usage records;
6. average time to respond to collocation requests;
7. average time to provide collocation
8. percentage of collocation due dates missed; and
9. average completion notice interval.

Although each of these measures are critical for determining whether BellSouth's performance is nondiscriminatory, the Commission itself specifically has recognized the importance of both prompt order completion notifications and jeopardy notices in its denials of previous BellSouth applications.[60] Nevertheless, BellSouth has ignored the Commission's guidance and chosen not to include these measures in its SQM.

Similarly, BellSouth has failed to respond to the Commission's request for comparative data with respect to its provisioning of FOCs and reject notices. Indeed, the Commission already has rejected BellSouth's claim that there are no retail analogues for FOCs and reject notices.[61] BellSouth also withholds comparative data by refusing to recognize retail analogues for the percentage of service requests rejected, average jeopardy interval, percentage of orders given jeopardy notices, and coordinated cutover interval. However, retail analogues exist for each of these functions.[62]

In cases where no retail analogues actually exist, the Commission has indicated that the BOC must establish specific performance standards that provide CLECs with a meaningful opportunity to compete.[63] Here, too, BellSouth has failed to follow Commission guidance.

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60 *See BellSouth South Carolina Order* ¶ 131, 139; *BellSouth Louisiana Order* ¶ 39.

61 *BellSouth Louisiana Order* ¶¶ 36 n.128, 33; *BellSouth South Carolina Order* ¶¶ 122, 118.

62 *See* Local Competition Users Group, Service Quality Measurements, Version 6.1, at 28-30 (filed in RM-9101, Oct. 8, 1998).

63 *See Ameritech Michigan Order* ¶ 141.

BellSouth has not established adequate performance benchmarks that will ensure CLECs a meaningful opportunity to compete. Instead, BellSouth has issued "target intervals" accompanied by a long list of excuses ("safety, load, weather, and availability of equipment and facilities") as to why they may not be met. BellSouth's target intervals are yet another indication that BellSouth does not take seriously its obligation to provide CLECs with nondiscriminatory access to interconnection, OSS and other UNEs.

BellSouth's SQM also fails to provide for a sufficient level of disaggregation. BellSouth offers measurements only on a statewide or region-wide basis. Such broad measurements, however, do not provide data upon which meaningful comparisons can be made and may mask discriminatory performance in particular geographic areas where CLECs compete with BellSouth. BellSouth's SQM also fails to disaggregate data by volume, product or service. This, too, ignores past Commission guidance as the Commission has recognized the importance of service level disaggregation previously.[64]

Finally, it is worth noting that BellSouth's Louisiana performance measurements are merely *interim* in nature. Based on its experience in the LPSC's costing docket, e.spire submits that it is far from certain that performance measures of any kind will be adopted on a permanent basis. Thus, until permanent measures are in place, the Commission cannot make a final determination on the matter.

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64 *Id.* ¶ 170.

IV. GRANT OF BELLSOUTH'S APPLICATION IS NOT IN THE PUBLIC INTEREST UNTIL THE LOUISIANA LOCAL EXCHANGE MARKET IS OPEN TO ACTUAL, EFFECTIVE COMPETITION

Section 271 requires a public interest finding, independent of and in addition to the Track A and competitive checklist requirements discussed above. As e.spire discusses below, BellSouth fails to demonstrate that grant of its Application would be in the public interest. Indeed, approval of BellSouth's Application is not in the public interest because BellSouth has not taken the necessary steps to open its local exchange markets to competition. Section 271's promise of in-region interLATA authority represents virtually the sole incentive BellSouth has to open its local markets. Thus, once Section 271 authority is granted, BellSouth will have little or no reason to rectify the pricing, provisioning and other checklist deficiencies discussed above. Nor will BellSouth have any impetus to change many additional practices and tactics that it employs to disadvantage its competitors and protect its local service monopoly. In short, BellSouth's entry into the interLATA market is not in the public interest because removing the incentive provided by Section 271 at this time would have a tremendously detrimental effect on the development of local competition in Louisiana.

A. The Commission Already and Rightly Rejected the Public Interest Analysis Proffered by BellSouth

BellSouth's discussion of the public interest standard provides an excellent example of why grant of its Application is not in the public interest at this time. As it has done with respect to pricing and checklist implementation, here, too, BellSouth largely ignores congressional intent on the matter and the guidance issued previously by the Commission. Aside from being a bad public policy decision, it simply would not be in the public interest to reward such intransigence.

BellSouth's argument that Section 271's public interest assessment should be limited to the interLATA market and should be judged by the potential benefit to consumers that may result from its promise to offer a discount of five percent off AT&T's *basic rates,* and from what then would be its new-found monopoly in one stop-shopping, misses the mark entirely. Simply put, Congress did not include the public interest test in Section 271 so that it could be manipulated in a way that would trade-off the promise of local competition for a small discount on AT&T's basic rates, a discount that would not be competitive, absent bundling with BellSouth's local monopoly services. Nor did Congress intend for BellSouth to be able to turn its monopoly control over the local market into an (anti)competitive advantage in the long distance market. Congress was clear: effective local competition must be in place *before* the BOCs are granted interLATA authority.[65] The public interest test cannot be manipulated to reverse these priorities.

As BellSouth itself recognizes,[66] the Commission already has rejected its argument that the public interest test was intended to focus exclusively on the effect of BellSouth's entry into the interLATA market and has concluded instead that the primary focus of its public interest inquiry must be the impact on the local market caused by granting BellSouth in-region interLATA authority.[67] In fact, the Commission explicitly rejected the view that its public interest review must be "limited narrowly to assessing whether BOC entry would enhance competition in the long distance market."[68] Rather, the Commission has determined that the

65 *See, e.g., Ameritech Michigan Order* ¶ 388.

66 BellSouth Brief at 74.

67 *Ameritech Michigan Order* ¶¶ 386-391.

68 *Id.* ¶ 386.

public interest requires a finding that "the BOC has taken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[69] BellSouth has not and currently cannot make that showing.

To be sure, the Commission has stated that its "public interest analysis will include an assessment of the effect of BOC entry on competition in the long distance market."[70] However, the Commission recognized that Section 271 embodies a congressional determination that, in order for the potential for additional long distance competition to become a reality, "local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market." Only then, the Commission explained, would the "congressional intention of creating an incentive or reward for opening the local exchange market [be] met."[71]

Mindful of the standard set by the Commission, BellSouth also suggests that its entry into long distance will spur the big IXCs to enter Louisiana's local exchange market.[72] However, this argument is nothing more than a distraction. e.spire and other facilities-based carriers have invested heavily in Louisiana. Thus, it is not from any lack of interest on the part of competitors that local competition has not developed more fully in Louisiana. Rather, it is BellSouth that is delaying competition by refusing to trade its monopoly and open its local markets in exchange for a hand in the interLATA and one-stop shopping markets. Until BellSouth accepts this congressionally crafted bargain, additional competition in both the local and long distance

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69 *Id.*

70 *Id.* ¶ 388.

71 *Id.*

72 BellSouth Brief at 106.

markets will be delayed until appeals and enforcement actions run their course and force BellSouth into compliance.

B. BellSouth Uses the Advantages of Incumbency to Delay Local Competition

As stated above, Section 271 represents the only incentive BellSouth has to open its local markets fully, fairly and irreversibly. As e.spire already has demonstrated, it is far too early to remove that incentive for BellSouth in Louisiana. However, the Commission has indicated that evidence regarding the BOC's failure to act in good faith or cooperate with its competitors, or evidence that it has engaged in discriminatory or anticompetitive conduct, will dictate against its finding that grant of the BOC's Section 271 Application is in the public interest.[73] Thus, e.spire supplies the following information to underscore the fact that, in many instances, BellSouth has neither cooperated nor acted in good faith but, rather, has forestalled competition.

Perhaps the best example of BellSouth's questionable commitment to achieving the 1996 Act's goal of replacing regulated local monopolies with market-based competition is captured in BellSouth's practice of unilaterally modifying LPSC-approved interconnection agreements with its competitors. Although the e.spire/BellSouth Interconnection Agreement contains a most favored nation clause and reciprocal compensation terms that require payments to e.spire for BellSouth-originated traffic terminated at ISPs on e.spire's network, BellSouth unilaterally has refused to honor either provision. Only a monopoly can unilaterally change the terms of agreements without risking that the other party might walk away. Because of the unequal

[73] *See Ameritech Michigan Order* ¶ 397.

bargaining power between e.spire and BellSouth, e.spire is forced to turn to lengthy and expensive arbitration and litigation to enforce its rights under the agreement. However, with the prospect of Section 271 authority hanging in the balance, e.spire remains hopeful that BellSouth will voluntarily mend its ways.

BellSouth also has conducted what amounts to an assault on the crucial provision of the e.spire/BellSouth Interconnection Agreement that requires coordinated customer cutovers be performed in five minutes or less. As discussed above, BellSouth has never reported its ability to perform coordinated conversions in five minutes or less. Interestingly, BellSouth reports one interval for loop customers, and a separate interval for number portability. It is unclear whether these intervals run consecutively.[74] Moreover, BellSouth does not offer an interval shorter than fifteen minutes in its SGAT and, claiming that cutovers in a five minute time frame are not physically possible, refuses to accept a five minute interval in any new interconnection agreements. If BellSouth is capable of performing cutovers in five minutes or less (it should be), local competition will be hampered by performance, SGAT provisions or negotiated agreements that provide competitors with anything less.

BellSouth's efforts to impede competition also extend to its activities in the carrier customer market. In February 1996, e.spire (then ACSI) filed a Formal Complaint with the FCC with reference to the grossly excessive reconfiguration nonrecurring charges ("RNRCs") that BellSouth imposed on IXCs, attempting to make an access channel termination location ("ACTL") move to e.spire.[75] ACTL moves are required whenever an IXC agrees to switch all or

[74] BellSouth Brief at 56.

[75] *American Communications Services, Inc. v. BellSouth Telecommunications, Inc.*, FCC File No. E-96-20.

part of its direct trunked access transport services on a given route from BellSouth's network to the network of a competing provider, such as e.spire. Although incumbents typically require the payment of RNRCs to accomplish such ACTL moves, BellSouth's RNRCs are applied inconsistently and have effectively shut e.spire, and all other competitive providers, out of the customer facility market in BellSouth territory.[76]

In e.spire's experience, BellSouth has applied the RNRCs for ACTL moves in a manner which prevents IXCs from switching to e.spire transport services. As explained in e.spire's Formal Complaint, the charges imposed on IXCs are not reasonably related to the direct costs incurred by BellSouth in making the ACTL move. Indeed, they are inconsistent with the rates included in BellSouth's interstate access tariff. Even more troubling, the RNRCs imposed by BellSouth for IXC access network reconfigurations to connect to e.spire services routinely far exceed the reconfiguration charges imposed by BellSouth when an IXC orders reconfigurations from one BellSouth service to another.

BellSouth's excessive RNRCs effectively present carrier customers with three equally unattractive choices: (1) forego reconfiguration; (2) reconfigure with BellSouth so as to avoid or minimize the RNRCs; or (3) switch to e.spire and pay the RNRC costs (or force e.spire to absorb such costs). Indeed, it is often the case that the only way for e.spire to make a reasonable bid to a potential access customer is to include an offer to pay for the significant and unreasonable reconfiguration costs imposed by BellSouth. Unfortunately, this is almost always economically

76 ACSI Initial Brief, FCC File No. E-96-20, at 2-3.

infeasible.[77] As a result, e.spire's efforts to convince otherwise ready, willing and able access customers to switch from BellSouth transport services have been stymied.

[77] For example, e.spire's inability to absorb BellSouth's excessive RNRCs caused one IXC that had agreed to move thirteen (13) DS3 circuits from BellSouth to e.spire to back out of a five-year contract expected to be worth $500,000 in revenues.

Conclusion

For all of the foregoing reasons, BellSouth's second application to provide in-region interLATA services in Louisiana should be denied. BellSouth has not demonstrated compliance with Track A and has not fully implemented the competitive checklist, including the cost-based pricing provisions contained therein. Moreover, BellSouth has not demonstrated that grant of its application would be in the public interest. Because Louisiana's local exchange market is not fully, fairly and irreversibly open to competition, BellSouth's application must be denied.

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August 4, 1998

CERTIFICATE OF SERVICE

I, John J. Heitmann, hereby certify that copies of the foregoing "Comments of e.spire Communications, Inc." were served this 4th day of August, 1998, by hand delivery, Overnight Courier, or U.S. mail (first-class postage prepaid) on the following:

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